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July 10, 2015

Jared Manning
Assistant Utah State Engineer
Utah Division of Water Rights
1594 North Temple, Suite 220
P.O. Box 146300
Salt Lake City, UT 84114-6300

RE: Sevier River Modeling

Dear Mr. Manning:

Officers of the Delta Canal Company, Melville Irrigation Company, Abraham Irrigation Company, Deseret Irrigation Company and Central Utah Water Company ("Consolidated") have raised concerns regarding your thoughts on the Sevier River modeling that would allow certain Section A primary water users¹ to increase their water rights by using Section A unused primary water.

It is our understanding that your preliminary thoughts are that if any primary water user(s) in Section A do not use their primary water, you would distribute such water to those primary users that have diversions physically located downstream from those who choose not to use their primary water, thus allowing such downstream user(s) to make up 100% of their primary right(s). In our opinion, this would violate both the Morse Decree and Cox Decree. Aside from any arguments or claims some of the Section A users may have for not being able to share in unused primary occurring below them, such actions may also constitute an illegal taking of water owned by the storage companies. In addressing this matter, this letter will primarily focus on the rights of the parties under the Morse and Cox Decrees.

¹ The main primary users in Section A include the A-L users, Vermillion Irrigation Company and the Monroe South Bend Canal Company.

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WATER RIGHTS
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MORSE DECREE AND COX DECREE

The Cox Decree is the law of the Sevier River and has been since 1936. The provision in the Cox Decree governing Section A users was adopted by stipulations of such users as set forth in the Morse Decree² and was the subject of litigation in the Utah Supreme Court case of *Richlands Irrigation Company v. Westview Irrigation Company, et al.* ("Richlands") 80 P. 2d 458 (Utah 1938), which will be discussed below.

The Morse Decree was entered on May 16, 1906. The Decree states:

"That all rights subject to pro rata distribution and the parties entitled thereto, are divided into three sections, viz: Sections "A", "B", and "C"... ." (Emphasis added).
(See p. 2, Section II, Morse Decree)

This provision is important because it identified the water users in Section A, which included the Vermillion Irrigation Company, that were subject to pro rata distribution.

The pertinent provision of the Morse Decree governing Section A users states:

"That whenever the waters of said river and said tributaries flowing in Section "A" are insufficient to supply all of the rights hereinbefore decreed to said section each of said rights shall be diminished pro rata. (Emphasis added).
(See p. 10, Section III, Morse Decree)

The pertinent provision of the Cox Decree governing Section A users likewise adopts the parties stipulation. It states:

"Whenever the waters available for distribution in said river, flowing in said Section A, are insufficient to supply all the waters of each class therein, then each class shall have precedence in their order as herein set out, and the rights of each party in each said class shall be diminished pro rata." (Emphasis added). (See p. 8, Cox Decree)

Both the Morse Decree and Cox Decree are consistent, that whenever the waters flowing in Section "A" are insufficient to supply all the rights decreed then each of said rights

² Attached is a table showing a comparison of the 1906 Morse Decree and the 1936 Cox Decree for Section A Primary Rights from May 1 to September 30. The Cox Decree amended some of the names and water allocations of the water rights recipients, however, the total flow rates remained the same, i.e. 296.86 c.f.s..

shall be diminished pro rata³.

It appears that you are proposing to increase the rights of certain Section A primary water users instead of diminishing such rights as required by both the Morse Decree and Cox Decree.

When a party's right is diminished pro rata, that then becomes the party's full water right; each party having received one hundred percent (100%) of the water to which it is entitled. To allow a party more than its pro rata share (unless allowed pursuant to the primary users certificated right discussed below), would result in an enlargement of such party's right with water that would otherwise belong to the storage companies.

The State, at the expense of the other Section A primary users and the storage companies, cannot indiscriminately issue water to certain Section A users on its own volition. Likewise, the State cannot issue water to Section A primary users in an attempt to make up their direct flow rights that would otherwise make up part of Piute's and/or Consolidated's storage rights; such action, in our opinion, would result in an unconstitutional taking.

We would also point out, as discussed in State Engineer Wayne D. Criddle's letter to River Commissioners W. C. Cole and Keith B. Christensen, dated July 31, 1961 that there is no statement in the decree that allows Section A primary users to decline diversion of water and then claim exchange water from Piute Reservoir for the by-passed water. There can be no exchange of unused primary water in Section A for a credit in Piute Reservoir; this has never been approved by an exchange application. A copy of said July 31, 1961 letter is provided herewith.

In the event your office allows such unused primary water to be used by other Section A primary users or attempts to allow an exchange, it would have the effect of giving a right to such users to which they are not entitled and which would result in a direct impairment to the storage companies' rights, thereby taking water that would otherwise contribute to Piute's and Consolidated's storage under the storage priorities set forth in the Cox Decree. Please be advised that Consolidated will take exception to any water rights administration that could affect its storage rights and will take such steps as it deems necessary and warranted to protect such rights.

VERMILLION IRRIGATION COMPANY

In certain correspondence you have issued, you specifically focused on the Utah Supreme Court case of *Richlands Irrigation Company v. Westview Irrigation Company, et al.* ("Richlands") 80 P. 2d 458 (Utah 1938) which involved Vermillion Irrigation Company ("Vermillion"). It appears that

³ The only party in Section A that has a "superior" right as against all other parties in Section A, is Monroe South Bend Canal Company. (See p. 6, Cox Decree)

you are suggesting that Vermillion is entitled to receive a water right of 37.80 c.f.s. even in those years when there is insufficient water to supply Vermillion its full water right of 37.80 c.f.s., by allocating to it the unused direct flow primary rights of those companies in Section A of the Sevier River.

You cite the second to last paragraph of the majority opinion of the *Richlands* case (hereafter referred to as “conclusion”) which states:

*We are of the opinion, and so hold, that the District Court in decreeing water rights pursuant to the stipulations of the parties cannot lawfully, by zoning the river or otherwise, give junior claimants, either by direct flow or storage from winter flow of the river, rights or priorities that are superior to the Series A primary water rights, or preference of service by the State Engineer or Water Commissioner in distributing the waters of the river whenever the flow is insufficient to supply said Series A rights. To the extent that the reservoirs have purchased or traded for, and thereby acquired, some of the Series A primary rights, to that extent they have become substituted to the rights of the original owners of the rights so acquired. It does not appear by the record before us that they have succeeded to any of the rights of the Vermillion in either the summer or winter flow of the river, to the extent of its 37.80 c.f.s. water awarded it under the Morse decree, and continued in effect by the stipulations. We hold that all the Vermillion’s rights under the Morse decree remain intact, are not reduced or impaired by the contract settling rights, but are preserved and protected thereby. (Emphasis added) *Richlands*, 80 P. 2d at 467.*

In this paragraph, the Court is simply rejecting the arguments put forth by the lower river users and certain upper river users on how the water between Annabella Dam and Vermillion Dam should be regulated and administered under the parties’ stipulation, which would have had the effect of giving them superior rights as against Vermillion. The salient issue in the *Richlands* case centered around the meaning of what constituted all the water of the Sevier River accumulating therein between the Annabella Dam and the Vermillion Dam.

The last sentence in the conclusion states: “We hold that all the Vermillion’s rights under the Morse decree remain intact, are not reduced or impaired by the contract settling rights, but are preserved and protected thereby.” (Emphasis added) *Id.* at 467. In other words, the Morse decree remains in full force and effect for Vermillion’s right in Section A. However, it is important to note that the Morse Decree did not award Vermillion a right superior to the other primary water users in Section A. On the contrary, Vermillion was placed on the same footing as the other primary users in Section A so that when the full amount of water was not available to satisfy the rights of all the primary users in Section A, they were required to pro rate the water.

The Court confirmed this position in the *Richlands* case by stating:

It will be noticed that in the paragraph we have quoted from the contract settling rights there are two separate and independent provisions. The first is a year-round right up to 37.80 second feet, without any reference therein to redundancy or scarcity of the supply of water in the river. The other provision relates solely to times of scarcity when there is insufficient water in the river to supply in full all of the awards made to Series A users by the contract. In such a situation, under the law as it stands independently of the contract, all those of equal right and priority must prorate the shortage between them. The contract does nothing more or different from what the law would require and enforce had the contract made no provision for such an emergency. It tallies with the law. (Emphasis added) Richlands, 80 P.2d at 465,466.

Neither Vermillion nor any other Section A primary users, with the exception of Monroe South Bend Canal Company, has a superior right against the other parties in Section A, however, some or all of the parties in Section A may still be able to receive a full water right if they use their water stored in Otter Creek or Piute Reservoir⁴ or if under their certificated right, one or more of the other shareholders in Section A are able to transfer their rights to another user.

SECTION A CERTIFICATED RIGHTS

In 1999, Section A primary users filed a change application to allow use of water in other companies' service areas. A certificate was issued April 18, 2013 to each company, granting such change. This was done to allow shareholders who had land in one service area to transfer their water to the other service area or to allow such shareholder to transfer his/her water to another service area for use. This was not done to allow primary water to be spread to other companies or shareholders at the expense of the storage companies' rights. As such, the certificated right issued under said change application is subject to *East Bench Irrig. Co. v. Deseret Irrig. Co.*, ("*East Bench*") 300 P.2d 603, 608 (1956).⁵

The explanatory contained in said certificate states:

This water right can be transferred within the service area of Sevier Valley Canal Company, Richfield Irrigation Canal Company, Annabella Irrigation Company, Elsinore Canal Company, Brooklyn Canal Company, Monroe Irrigation Company, Wells Irrigation Company, Joseph Irrigation Company, Vermillion Irrigation Company and Monroe South Bend Canal Company.

Such a transfer, in addition to being subject to the *East Bench* case, must be between

⁴ Vermillion has storage rights in Otter Creek Reservoir but not in Piute Reservoir. The other Section A users have storage rights in both reservoirs.

⁵ In *East Bench*, the Utah Supreme Court held that the storage companies, as well as others, have a vested right to the same flow of water, in the same quantity as it would have done without the proposed change application.

stockholders, not companies. The only way such a right can be transferred is by filing a temporary change application with the associated maps showing the heretofore and hereafter uses or by having some other record in writing, in advance, so that the River Commissioner can administer any transfers and have such records available to account for all the primary water under the change.

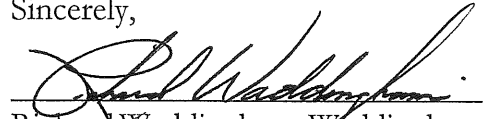
CONCLUSION

Unless there is sufficient water to satisfy the rights of the Section A primary waters users from the natural flows of the river or, such rights are made up from storage held in Otter Creek or Piute Reservoir or, a shareholder is able to transfer his/her right, in writing, to another service area which may or may not satisfy the party's full decreed rights, any unused primary water must be let down to allocate storage water between Sevier Bridge Reservoir and Piute Reservoir. Failure to do so would violate the Morse and Cox Decrees and impair the rights of Piute and Consolidated.

We respectfully ask that you respond and address any issues or concerns you may have after considering the information provided herein, or based on information you may have that we have not yet had an opportunity to consider. Also, at your earliest convenience, we would appreciate the opportunity to meet with you and further discuss our positions on the issues addressed in this letter.

Thank you for your consideration of this matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Richard Waddingham", is written over a horizontal line.

Richard Waddingham, Waddingham
& Associates, for Consolidated

cc: Boyd Clayton
Susan Oderkirk
Kirk Forbush
DMADC Presidents
Piute Reservoir & Irrigation Company

Comparison of 1906 Morse Decree and 1936 Cox Decree for Section A Primary Rights from May 1 to September 30

| 1936 Cox Decree – First Class Section A | | 1906 Morse Decree – First Class Section A | |
|---|----------------|---|----------------|
| Company | Flow* (cfs) | Company | Flow* (cfs) |
| Richfield Irrigation Canal Co. | 85.90 | Richfield Irrigation Canal Co. | 89.90 |
| Annabella Irrigation Canal co. | 30.40 | Annabella Irrigation Canal Co. | 30.40 |
| Elsinore Canal Company | 18.92 | Elsinore Canal Company | 17.40 |
| Brooklyn Canal Company | 29.77 | Brooklyn Canal Company | 28.90 |
| Monroe Irrigation Company | 47.90 | Monroe Irrigation Company | 47.90 |
| Isacson Ditch | 2.90 | Warenski, etal | 2.90 |
| Wells Irrigation Company | 10.90 | Wells Irrigation Company | 10.90 |
| Joseph Irrigation Company | 25.90 | Joseph Irrigation Company | 25.90 |
| Mills Ditch | 1.33 | George Mills | 1.33 |
| Elsinore Bench Irrigation Co. | 2.00 | Elsinore Bench Irrigation Co. | 2.00 |
| Sevier Valley Canal Co. | 3.14 | Sevier Valley Canal Co. | 0.00 |
| Vermillion Irrigation Company | 37.80 | Vermillion Irrigation Company | 37.80 |
| | | R. Nielson and J. Conder | 0.75 |
| | | N.M. Higgins, etal | 0.66 |
| | | Jacob C. Bastian | 0.12 |
| TOTAL | 296.86 | | 296.86 |

*Both the Cox Decree and the Morse Decree contain the provision that when the total amount of First Class water in Section A is not available that the users prorate it. The prorated percentages for the period of May 1 to September 30 are as follows:

| | | | | | |
|--------------------------------|--------|-----------------------|--------|-------------------------|--------|
| Richfield Irrigation Canal Co. | 28.94% | Monroe Irrigation Co. | 16.14% | Mills Ditch | 0.45% |
| Annabella Irrigation Canal Co. | 10.24% | Isacson Ditch | 0.98% | Elsinore B. Irr. Co. | 0.67% |
| Elsinore Canal Company | 6.37% | Wells Irrigation Co. | 3.67% | Sevier Valley Canal Co. | 1.06% |
| Brooklyn Canal Company | 10.03% | Joseph Irrigation Co. | 8.72% | Vermillion Irr. Co. | 12.73% |



THE STATE OF UTAH
OFFICE OF STATE ENGINEER
SALT LAKE CITY
July 31, 1961

WAYNE D. CRIDDLE
STATE ENGINEER

Mr. W. C. Cole
Delta, Utah

Mr. Keith B. Christensen
Richfield, Utah

Gentlemen:

This office has completed its review of the sections of the Cox Decree which apply to rights of the A to L water users together with the voluminous material submitted by the affected parties.

From this review, we have reached the following conclusions:

- 1 - Water originating above Piute Reservoir may be stored in the Reservoir for use of the A to L users during the period provided for in the decree whenever those users elect to do so.
- 2 - Direct flow waters from the tributaries entering the river below Piute Reservoir and above Vermillion Dam may be used during the period provided for in the decree by the A to L rights, when needed.
- 3 - We can find no statement in the decree indicating that A to L users may decline diversion of the water, by-pass it to Sevier Bridge Reservoir, and then claim exchange water from Piute Reservoir for this by-passed water.
- 4 - We believe that the physical inability to store the disputed water in Piute Reservoir is the limitation on this right. This is particularly true in the absence of specific language in the decrees granting the exchange that would be necessary.
- 5 - The only exception to this use of storage is that the A to L rights might expect a reasonable amount of water by held in Piute Reservoir and used for regulatory purposes.
- 6 - All users should be advised that waters entering the river below Piute Reservoir can be stored in the Sevier Bridge Reservoir and credited to the A to L rights for exchange with Piute only by written agreement by all parties concerned, even though this practice may not have been followed in the past. If such an agreement is reached, copies should be supplied to the State Engineer and his Sevier River water commissioners. Past procedure may be a factor in arriving at such agreements but until they are formally developed, the above order is in effect.
- 7 - The River Commissioners are therefore ordered to allow the A to L users no credit for storage of undiverted water in the Sevier Bridge Reservoir without following the procedures outlined in item 6.

Yours very truly,

Wayne D. Criddle
Wayne D. Criddle

WDC/eca

cc: Messrs. Chamberlain
Waddingham